

LETTER OPINION
2000-L-81

May 22, 2000

The Honorable Bruce Hagen
President
North Dakota Public Service Commission
State Capitol
600 East Boulevard Avenue Department 408
Bismarck, ND 58505-0480

Dear Commissioner Hagen:

This is in response to the Public Service Commission's request for clarification of my December 23, 1999, opinion to the Commission. 1999 N.D. Op. Att'y Gen. 74 (Dec. 23 to Bruce Hagen) (hereafter 1999 opinion). Specifically, the Commission asks how the 1999 opinion applies to sales or mergers of rural electric cooperatives.

The question presented here, as in the 1999 opinion, involves the legal interpretation of N.D.C.C. §§ 49-02-01.1 and 49-04-05. The application of N.D.C.C. § 49-02-01.1 to rural electric cooperatives has been succinctly stated by the North Dakota Supreme Court:

An electric cooperative formed under Chapter 10-13, N.D.C.C., is not subject to the control of the public service commission. Section 49-02-01.1, N.D.C.C.[.]

Montana-Dakota Utilities Co. v. Divide County School Dist. No. 1, 193 N.W.2d 723, 730 (N.D. 1971). As further explained in this letter, it is my opinion that this observation by the North Dakota Supreme Court has not been changed by any intervening legislative amendments and accurately describes the current status of the Commission's authority to regulate mergers and sales of rural electric cooperatives.

The request letter from the Commission describes the 1999 opinion as stating "that the Public Service Commission does have jurisdiction over sales and mergers of other utility cooperatives and small companies." (Emphasis added.) The only reference to other utility cooperatives and small companies in the 1999 opinion merely indicates

that the interpretation of the last sentence in N.D.C.C. § 49-02-01.1 to exclude telephone cooperatives does not necessarily exclude other utility cooperatives or small companies. 1999 N.D. Op. Att'y Gen. at 77. This statement is certainly not an opinion supporting the jurisdiction of the Commission over rural electric cooperatives. The last sentence in N.D.C.C. § 49-02-01.1 states: "Nothing in this section limits the authority of the commission under chapter 49-03.1 or sections 49-04-05 or 49-04-06. As I concluded in the 1999 opinion, this sentence is simply a reservation of authority located elsewhere in Title 49 and is not a direct grant of authority to the Commission.

The basis for the Commission's jurisdiction to review mergers and sales of public utilities is N.D.C.C. § 49-04-05, which provides: "A public utility may not dispose of, encumber, merge, or consolidate its franchise, works, or system necessary or useful in the performance of its duties to the public without prior commission approval."¹ The phrase "public utility" is not defined in N.D.C.C. ch. 49-04 and is therefore subject to the general definition in N.D.C.C. § 49-01-01:

In this title, unless the context or subject matter otherwise requires: . . . 3. "Public utility" includes any association, person, firm, corporation, limited liability company, or agency engaged or employed in any business enumerated in this title.²

On its face, this definition includes rural electric cooperatives which are incorporated under N.D.C.C. ch. 10-13.³ N.D.C.C. § 49-02-01.1, which is the general exemption from Commission jurisdiction for public utilities owned and operated by a government

¹ This section has not been changed in any way which is material to this opinion since the section was originally enacted in 1919. 1919 N.D. Sess. Laws ch. 192, § 21.

² This definition has not been changed in any way which is material to this opinion since the definition was originally enacted in 1919. 1919 N.D. Sess. Laws ch. 192, § 2.

³ The North Dakota Supreme Court has issued at least three other decisions in which it specifically concluded that a rural electric cooperative is not a "public utility" and is not subject to the jurisdiction of the PSC. Lill v. Cavalier Rural Elec. Co-op., Inc., 456 N.W.2d 527 (N.D. 1990); Northern States Power Co. v. North Dakota Public Service Comm'n, 452 N.W.2d 340 (N.D. 1990); Montana Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414 (N.D. 1967). However, these decisions involved the statutes collectively known as the Territorial Integrity Act. Rural electric cooperatives are specifically excluded from the definition of "electric public utility" under the act. N.D.C.C. § 49-03-01.5(3).

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entity or a nonprofit corporation, refers to the powers of the Commission which are provided in N.D.C.C. chs. 49-02 or 49-21, and not to the powers of the Commission which are located in other chapters in N.D.C.C. title 49. This exemption specifically reserves any regulatory authority of the Commission under N.D.C.C. § 49-04-05.

Considering the language in current N.D.C.C. § 49-02-01.1, in conjunction with the general definition of "public utility" in N.D.C.C. § 49-01-01, one can understand the suggestion that the Commission has jurisdiction over mergers and sales of rural electric cooperatives. However, this office is also aware that the Commission has not previously exercised any regulatory authority over the mergers and sales of such cooperatives. N.D.C.C. § 49-04-05 does not appear to give the Commission discretion to exempt certain classes of public utilities, such as rural electric cooperatives, from its review of proposed sales or mergers. Accordingly, to answer the question presented, which turns in part on the meaning of "public utility" as used in N.D.C.C. § 49-04-05, it is necessary to examine the history of the Commission's regulation of rural electric cooperatives.

Much of current N.D.C.C. title 49 originates in a law which was passed in 1919.

Chapter 192, Session Laws N.D.1919 was a comprehensive act defining public utilities and authorizing the Board of Railroad Commissioners to regulate, control and fix charges and rates of such utilities. This act forms the basis of much of our present statutory law authorizing the regulation of public utilities by the Public Service Commission. Section 23 of that act provided:

"Nothing in this Act shall authorize the Commissioners to make any order affecting rates, tolls or charges, contracts, or services rendered or the safety, adequacy, sufficiency of facilities, or the rules or regulations of any public utility owned and operated by the State, city, county, township, town or village or any other political subdivision of the State, or any public utility that is not operated for profit, but all other provisions herein shall apply to such utilities."

This Section now appears as Section 49-0213, NDRC 1943. It indicates an intention on the part of the Legislature to, in a large measure, withhold from the Public Service Commission jurisdiction and authority over public utilities owned and operated by the state.

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City of Grafton v. Otter Tail Power Co., 86 N.W.2d 197, 202 (N.D. 1957) (emphasis added). See also Thomas v. McHugh, 256 N.W. 763, 769 (N.D. 1934) (a later-enacted provision regarding regulation of public utility rates does not supersede the general regulatory exemption for municipal utilities). Although the sentence underlined above is specifically addressed to government-owned public utilities, it applies equally to nonprofit utilities other than telephone or telegraph utilities.⁴ See 1962-64 N.D. Op. Att'y Gen. 50, 51 (Mar. 25, 1964) (Commission is "without jurisdiction over sales of energy by a non-profit cooperative. Section 49-02-01.1, North Dakota Century Code."); 1966-68 N.D. Op. Att'y Gen. 166, 170 (Oct. 30, 1967) (same).

Originally, the statutes which are currently codified in N.D.C.C. §§ 49-02-01.1 and 49-04-05 were located in the same act. See 1919 N.D. Sess. Laws ch. 192, §§ 21, 23. As quoted above, the original exemption in section 23 of the 1919 law for most government and nonprofit utilities applied to the entire "act," including the provision in original section 21 on sales and mergers. Thus, the Commission clearly did not have jurisdiction under the original 1919 law to regulate the sales and mergers of government and nonprofit utilities other than telephone or telegraph utilities.

In 1943, the 1919 act was broken up and codified in several chapters of Title 49. As part of this revision, the exemption for government and nonprofit utilities was codified as § 49-0213 and expressly limited to chapter 49-02 of the revised code. By contrast, the original provision on sales and mergers was moved to a different chapter of the revised code and was codified as § 49-0405. Thus, beginning in 1943, an argument could be made that the exemption for government and nonprofit utilities no longer precluded Commission jurisdiction over sales and mergers of those utilities.

Weighing against this argument is the 1943 Code Revision Report, which details the intent of the revisions to the 1919 act. The absence of any Reviser's Note to § 49-0213 indicates that no change from current law was intended. Similarly, the note following § 49-0405 simply states that the section was revised for clarity and to conform to a North Dakota Supreme Court decision on the effect of a transaction which had not yet been approved the Commission. Despite the replacement of the phrase "Nothing in this Act" with "Nothing in this Chapter" in the predecessor to N.D.C.C. § 49-02-01.1, the Code Revision Report reveals that there was no intent to change the

⁴ Indeed, if N.D.C.C. § 49-04-05 and other provisions in Title 49 are interpreted to apply to rural electric cooperatives, those provisions also would necessarily apply to government utilities.

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operation of current law regarding most government and nonprofit utilities: the Commission had no jurisdiction over those utilities, including authority to review sales and mergers of those utilities.

Also helpful in looking at the context of the phrase "public utility" as used in N.D.C.C. § 49-04-05 is the organization of Title 49 of the Revised Code of 1943. As revised in 1943, Chapter 49-01 defined the Public Service Commission; Chapter 49-02 identified the general powers of the Commission; Chapter 49-03 described how public utilities could begin operating; Chapter 49-04 identified the duties of public utilities; Chapter 49-05 involved the procedure for regulation by the Commission; Chapter 49-06 pertained to the valuation of public utilities; and Chapter 49-07 listed the penalties for failing to comply with the Commission's orders. The structure of revised Title 49 lends support to the view that the duties of public utilities under the 1919 act which were codified in Chapter 49-04 continued to apply only to those public utilities over which the Commission had jurisdiction under Chapter 49-02.

The 1943 revisions to the 1919 act could be read either as a substantive increase in the Commission's jurisdiction or as a technical rewording of the law which was not intended to change current law regarding government and nonprofit utilities. Therefore, the revisions, which are still included in current N.D.C.C. § 49-02-01.1, were ambiguous.

In construing statutes the courts must take judicial notice of history of the terms employed and, where statutes have been in existence for a long period of time, it must be presumed that [the] Legislature has at all times been aware of the meaning originally attaching to those terms.

Horst v. Guy, 219 N.W.2d 153, 157 (N.D. 1974). As mentioned earlier, the historic meaning of "public utility" in the sales and mergers law did not include most government and nonprofit utilities. Furthermore, the Legislature is presumed to be aware of the Commission's long-standing interpretation of this section, and the failure to amend this section indicates legislative acquiescence in that construction. Effertz v. North Dakota Workers Compensation Bureau, 525 N.W.2d 691 (N.D. 1994).

Based on the Commission's previous lack of jurisdiction over most government and nonprofit utilities, the lack of any intent in the Code Revision Report to change current law, the flexible definition of "public utility," the overall structure of N.D.C.C. Title 49, and the Legislature's acquiescence with the Commission's interpretation of the law, I conclude the Commission's historic practice under N.D.C.C.

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§ 49-04-05 and its 1943 predecessor of declining to assert jurisdiction over government and nonprofit utilities, including the sales and mergers of rural electric cooperatives, was a reasonable construction of its statutory obligations. I am confident that my predecessors, if asked, would have advised the Commission that the 1943 revisions did not extend the Commission's jurisdiction to include government and nonprofit utilities which were previously exempt under the 1919 act.

This conclusion supports the Commission's actions until 1993, which was the first time since the 1943 revisions, except for a minor 1969 amendment regarding safety standards, that either N.D.C.C. §§ 49-02-01.1 or 49-04-05 were amended in a way which might affect rural electric cooperatives. The remaining question in this opinion is whether the historical context of the exemption for government and nonprofit utilities still governs the definition of "public entity" in N.D.C.C. § 49-04-05 after the 1993 amendment to N.D.C.C. § 49-02-01.1. The 1993 amendment added the last sentence in current N.D.C.C. § 49-02-01.1, which was discussed earlier in this opinion and specifically reserves any jurisdiction of the Commission under N.D.C.C. § 49-04-05 notwithstanding the general exemption for most government and nonprofit utilities in N.D.C.C. § 49-02-01.1.

The 1993 amendment at issue here was added after the first hearing on 1993 Senate Bill 2317. A representative of the North Dakota Association of Telephone Cooperatives explained some of the reasons for reserving the application of certain provisions in Title 49 despite the general exemption for telephone cooperatives. Hearing on S.B. 2317 Before the Senate Comm. on Government and Veterans' Affairs 1993 N.D. Leg. (Feb. 11) (Committee minutes). See also Id. (Feb. 5) (Written testimony of Illona Jeffcoat-Sacco) ("The Commission is also concerned that it retain authority to approve sales and acquisitions [of telecommunications companies]."). The legislative history of this amendment pertains exclusively to telecommunications companies and is completely silent on the amendment's potential application to government and nonprofit electric utilities. There was no testimony or comment on the bill from any representative of the electric industry.

In response to the Commission's inquiry, this office obtained a copy of a September 28, 1994, letter from the Commission's director of public utilities to the United States Department of Agriculture which states in part: "It continues to be the opinion of the commission that none of these 1993 legislative changes was ever intended to apply to electric cooperatives." Although the letter was not signed by the members of the Commission, it is consistent with the Commission's practice up to this time of not regulating the sales or mergers of

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rural electric cooperatives and is specifically addressed to the effect of the 1993 amendments on those cooperatives. For decades, the Commission's interpretation of "public utility" for purposes of N.D.C.C. ch. 49-04 has been based in historical context as much as a strict interpretation of the general exemption language in N.D.C.C. § 49-02-01.1.

There is no element of choice in the Commission's jurisdiction under N.D.C.C. § 49-04-05. The definition of "public utility" as generally used in N.D.C.C. title 49 must be applied in its historical context. Throughout its regulatory history, the Commission has refrained from exercising general regulatory authority over rural electric cooperatives. The Legislature has acquiesced in the Commission's historical interpretation of its lack of regulatory authority over rural electric cooperatives. While arguments could be made in support of the Commission's jurisdiction, particularly in light of the 1993 amendment to N.D.C.C. § 49-02-01.1, the fact remains that the Commission has never exerted regulatory authority over rural electric cooperatives. Despite the occurrence of three legislative sessions since the 1993 amendments, the Legislature has continued to acquiesce in the Commission's interpretation. The North Dakota Supreme Court has recently rejected an effort by the Commission to reverse its interpretation of a statute regarding its jurisdiction, in light of the Commission's prior long-standing interpretation and legislative acquiescence in that prior interpretation. Capital Elec. Co-op., Inc. v. Public Service Comm'n, 534 N.W.2d 587 (N.D. 1995).

To summarize, the 1993 amendments created another ambiguity regarding the Commission's jurisdiction over government and nonprofit utilities. However, a change in the Commission's interpretation of Title 49 to authorize jurisdiction over sales and mergers of rural electric cooperatives is not consistent with legislative intent, with the Commission's long-standing interpretation of its jurisdiction, or with legislative acquiescence in that interpretation. Accordingly, it is my opinion that the Commission does not have jurisdiction to review the sales and mergers of rural electric cooperatives.

Sincerely,

Heidi Heitkamp
Attorney General

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